No. 94-1971

In The

Supreme Court of the United States

October Term, 1995

SAMUEL LEWIS, *et al.*,

Petitioners,

vs.

FLETCHER CASEY, JR., *et al.*,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF OF RESPONDENTS

ELISABETH ALEXANDER
(Counsel of Record)
ANDREA KHAN
MARGARET WINTER
ALVIN J. BRONSTEIN
National Prison Project
of the American Civil
Liberties Union Foundation
1616 Connecticut Avenue, N.W.
Suite 310
Washington, DC 20009
(202) 234-4830

ALICE L. SENECHAL
1542 West McDowell Road
Phoenix, AZ 85007
(602) 253-2954

STEVEN R. SHAPIRO
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, NY 10036
(212) 944-9800

QUESTION PRESENTED

Whether the district court's order correctly applies the constitutional requirements set forth in *Bounds v. Smith*, 430 U.S. 817 (1977).

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STATEMENT OF THE CASE

The statement of the case in the brief of petitioners (hereinafter defendants) does not accurately reflect the record. Many of their allegations are contrary to the facts found by the district court[1] and are not supported, or only partially supported, by citations to the record.[2] For this reason, respondents (hereinafter plaintiffs) set forth their own statement of the case. Due to space limitations, plaintiffs do not respond to every inaccuracy in defendants' brief, but discuss only those that are most material to the issues to be decided by this Court.

On January 12, 1990, twenty-two prisoners filed this class action lawsuit, pursuant to 42 U.S.C. § 1983, challenging the policies and practices of the Arizona Department of Corrections[3] (hereinafter ADOC) with regard to access to the courts, among other matters. Following a three-month bench trial, the district court found that several policies of the ADOC violated the prisoners' right to meaningful access to the courts. *Casey v. Lewis*, 834 F. Supp. 1553 (D. Ariz. 1993), App. B to Petition for Writ of Certiorari (hereinafter Pet. App. B). The court found that two groups of prisoners in particular were denied meaningful access to the courts: those who are illiterate or non-English speaking and therefore unable to use a law library on their own, and those without direct access to law library books.

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[1] The defendants' challenge to the district court's factual findings was rejected by the court of appeals. *See Casey v. Lewis*, 43 F.3d 1261, 1266-1270 (9th Cir. 1994), App. A to Petition for Writ of Certiorari at 4a-13a (adopting findings of the district court). The defendants do not argue before this Court that these factual findings were clearly erroneous.

[2] This defect is due, in part, to the fact that defendants have attached an appendix (Appendix A) to their brief that lacks specific citations to the record, but which they nonetheless cite in support of many allegations. *See* Respondents' Motion to Strike Appendix A to Brief of the Petitioners (Sept. 1, 1995) (pending).

[3] The Arizona prison system consists of nine complexes, each of which is subdivided into several housing units. On January 22, 1992, the system housed a total of 14,424 men and 922 women. R.T. 1/27/92 at 11-12.

A. Illiterate Prisoners

The district court found that illiterate and non-English speaking prisoners are unable to research the law without assistance. Pet. App. B at 25a. The uncontradicted evidence at trial was that prisoners reading at an eighth grade or lower level cannot adequately use a law library without assistance. R.T. 11/22/91 at 198; J.A. 260.[4] The district court also found that as a result of their inability to receive adequate legal assistance, illiterate prisoners have had their cases dismissed with prejudice and have been unable to file legal actions. Pet. App. B at 25a. Many prisoners fall into these categories. Testing of incoming prisoners in 1990-1991 revealed that 17.2% had a reading level below sixth grade and 14.5% were non-English speaking. In 1989, a system-wide study of prisoners within the ADOC established that 35% of the adult incarcerated population had a reading level of seventh grade or below. Pet. App. B at 25a.

B. Prisoners Without Direct Access to a Law Library

In most facilities, prisoners in lockdown status[5] have no

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[4] In this brief, plaintiffs use the term "illiterate" to refer to all prisoners whose lack of proficiency in reading and writing English makes them unable to use a law library on their own. This usage is intended to refer to those prisoners found by the district court to be unable to use a law library without assistance. Pet. App. B at 25a, 43a. This usage tracks that of the Court in *Johnson v. Avery*, 393 U.S. 483, 487 (1969), where the Court referred to the category of prisoners who are in need of legal assistance as the "illiterate or poorly educated." The case law regarding "illiterate" prisoners would apply equally to non-English speaking prisoners because, by definition, they lack literacy in the language of the law library's contents.

[5] The defendants claim that approximately 261 prisoners were in lockdown status at the time of trial. Pets.' Brief at 6 (citing R.T. 1/27/92 at 8-20). The record citation does not support the claim. According to the cited testimony, the total capacity of the lockdown units for five prison complexes is 306; the testimony is silent on whether the other four complexes have lockdown units. The district court also included in the definition of lockdown facilities the

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physical access to the law library. They must rely on a "paging system" that allows them to request legal materials from the law library. This system results in "severe interference with their access to courts." Pet. App. B at 21a. Contrary to defendants' assertions, the number of books that can be requested,[6] and the length of time books can be kept,[7] are restricted. Pet. App. B at 24a. Also contrary to defendants' assertions, the district court found that such prisoners are often denied law books unless they can provide an exact citation,[8] and that they routinely experience long delays in receiving requested legal materials or legal

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[5](...continued)
approximately eleven hundred prisoners housed at two units in the Florence complex, Cellblock 6 (CB-6) and the Special Management Unit (SMU). *See* Pet. App. B at 20a, and R.T. 1/27/92 at 17-18.

[6] The defendants cite two portions of the record for the claim that lockdown prisoners are not limited in the number of books they can receive. Pets.' Brief at 6 (citing R.T. 1/7/92 at 86, 112; J.A. 144-145, 156). The first citation provides no support for the claim. The second citation to testimony of the Perryville librarian supports the claim, but only for the Perryville complex. The district court, however, made a contrary finding about the Perryville complex's practice based on the librarian's deposition and exhibits showing her actual handling of book requests. *See* Pet. App. B at 24a n.30.

[7] The only citation for the defendants' claim that lockdown prisoners can generally keep books for more than twenty-four hours is the testimony of a librarian from the Tucson complex. Pets.' Brief at 6 (citing R.T. 1/15/92 at 107-108; J.A. at 195-196). The testimony cited does not support this claim. Indeed, the witness says the opposite: lockdown prisoners usually are limited to keeping the materials overnight. R.T. 1/15/92 at 109; J.A. at 197.

[8] Pet. App. B at 22a. The defendants cite one witness' testimony for their claim, which is contrary to the findings of the district court, that prisoners are not required to give an exact citation. Pets.' Brief at 5 (citing R.T. 1/15/92 at 144; J.A. at 209). The testimony was from the librarian at ASPC-Winslow who said that prisoners did "[n]ot necessarily" have to give an exact citation to get requested materials. The district court's finding of a practice to the contrary was based on substantial evidence. *See* Pet. App. B at 22a n.22. Indeed, the forms given to prisoners indicate that prisoners "must be specific" about case citations. *See* Exs. 40 and 249 bd.

assistance.[9] Some prisoners in lockdown status are denied even this privilege, leaving them without any access to legal materials. The district court found that "[e]ven lockdown prisoners who are intelligent, literate, and legally trained are unable to do legal research under [a] paging system that allows only one or two books at a time every couple of days." Pet. App. B at 24a.

The same problems exist for other groups of prisoners who are allowed to go to the law library but not to gain direct access to the books themselves. General population prisoners at half of the facilities for which there is record evidence have no direct access to the books themselves. *See* Pet. App. B at 20a and Stipulation, J.A. 38-42.[10] The prisoners at two lockdown facilities are required to conduct their legal work in cages in the law libraries, and thus also lack direct access to the books. Pet. App. B at 20a.

These prisoners must request legal materials from untrained prisoner law clerks or security officers. Pet. App. B at 19a-20a. Some of the law libraries did not have complete lists of their contents, and not all of the law libraries with inventories posted the list.[11] Thus, prisoners without direct access did not even have an adequate basis on which to request books.

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[9] Pet. App. B at 22a-23a. The defendants claim that legal materials are generally delivered within twenty-four hours of the request, citing one witness. Pets.' Brief at 6 (citing R.T. 1/15/92 at 107-108; J.A. at 195-196). The cited testimony, which involves Santa Rita, a unit at the Tucson facility, in fact indicates that on Tuesday and Thursday, a request will take a day. On the other days, the request will take two or three days. R.T. at 107-108, 116-117. Indeed, the district court found that, in some institutions, it can take "several days, even weeks" for lockdown prisoners to receive requested materials. Pet. App. B at 22a-23a.

[10] Thus, the defendants' claim that "[g]eneral-population inmates may 'browse' the bookshelves in most law libraries," for which they cite only Appendix A (Pets.' Brief at 5), is not supported by the record.

[11] Stipulation, J.A. at 37, 41-43, 46-49. (North, South, Alhambra, San Juan, and Santa Maria did not have an inventory posted at time of pretrial stipulation; Arizona Center for Women did not have complete inventory posted.)

C. Sources of Assistance for Illiterate Prisoners and Prisoners Without Direct Access to a Law Library

The district court found that most of the law libraries are staffed by only security staff and prisoner law clerks. *See* Pet. App. B at 26a-27a. The Women's Division at ASPC-Florence and Alhambra have no civilian staff assigned to the law library. Stipulation, J.A. at 51-52. Law clerks and staff are restricted to providing prisoners with requested materials; contrary to defendants' assertion, prisoner law clerks do not provide research assistance to their fellow prisoners. Pet. App. B at 28a.[12] Where there is civilian staff, such staff do not perform research or assist in drafting legal documents. *Id.*[13]

For illiterate prisoners and prisoners without direct access to law books, the ADOC's sole provision for research and drafting assistance consists of untrained prisoner legal assistants.[14] *Id.* However, with regard to prisoners in lockdown status, legal assistants can help only those prisoners with a disciplinary charge or a criminal charge pending. Pet. App. B at 22a. Thus, with this exception, prisoners in lockdown status have no access to law books other than through the paging system described above, and are provided no assistance from a legal assistant or anyone with legal training.

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[12] For their claim that the law clerks provide specific research assistance, the defendants cite Appendix A, which lacks any specific citations to the record, and the parties' pretrial stipulation, J.A. at 50-54. Pets.' Brief at 7. The citation to the pretrial stipulation contains nothing supporting the defendants' claim.

[13] The defendants' claims regarding the training of staff are consistently exaggerated. For example, they claim that at the time of trial the ADOC employed eight librarians, all of whom had a degree in library science. Pets.' Brief at 6. In fact, the portions of the record cited by defendants support a claim for six librarians, four of whom have a degree in library science.

[14] Law clerks can assist their fellow prisoners only by giving them requested material from the law library stacks. In contrast, legal assistants can help other prisoners perform legal research and draft pleadings and letters to the court. Pet. App. B at 28a.

The district court found that there was an insufficient number of legal assistants available to assist prisoners who need legal assistance. Pet. App. B at 28a.[15] Moreover, the legal assistants frequently are not sufficiently skilled to provide prisoners with meaningful assistance. Pet. App. B at 30a. Prisoner legal assistants are not required to have any legal training and, in most facilities, the ADOC does not provide them with training.[16] Pet. App. B at 30a-31a. For a brief period of time, the ADOC promulgated a policy requiring that legal assistants meet competency standards and complete a legal research course, but the ADOC rescinded that policy. *See* Pet. App. B at 31a.[17]

The district court also found that the ADOC did not ensure the availability of Spanish-speaking legal assistants or law clerks, and that in many facilities there are none. Pet. App. B at 29a.[18]

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[15] The defendants claim that at the time of trial "there were at least ninety volunteer legal assistants throughout the State." Pets.' Brief at 7 (citing J.A. 50-54 and Appendix A). Appendix A, as noted, does not contain citations to the record. The Joint Appendix citation is to the pretrial stipulation, which notes fifty-one legal assistants, and some additional assistants (the number is not specified) at Mohave. The district court opinion makes findings showing sixty-five legal assistants. Pet. App. B at 26a-28a. The ADOC similarly exaggerates the number of prisoner law clerks. *Compare* the defendants' brief at 7 (claiming "at least fifty-five" law clerks) *with* the pretrial stipulation, J.A. 50-54 (39 law clerks) and the district court's finding of fact, Pet. App. B at 26a-28a (47 law clerks).

[16] The defendants state that two complexes have developed tests for prisoners seeking to become law clerks and legal assistants. Pets.' Brief at 7 (citing Pet. App. B at 37a). The district court's finding, and the portions of the record cited by the court in support of the finding, refer to tests for law clerks only. Moreover, the district court's finding refers only to the Perryville complex and one unit of the Tucson complex. There are four general units and a detention unit in the Tucson complex. R.T. 1/27/92 at 16.

[17] The defendants cite the rescinded policy as the sole support for the claim that legal assistants are chosen from prisoners who are determined to be capable of assisting other prisoners with legal research and writing. Pets.' Brief at 7 (citing Ex. 785). *See* Ex. 308 (showing rescission of portion of Ex. 785 requiring that legal assistants be competent).

[18] The defendants give no record citation in support of their claim that non-English speaking prisoners are generally assisted by interpreters. Pets.'

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D. Other Deficiencies

The district court also found deficiencies in the contents of the law libraries (Pet. App. B at 32a-34a),[19] and in various other policies and practices, such as the lack of confidentiality in attorney-client telephone calls[20] and the photocopying of legal

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[18](...continued)
Brief at 8. The defendants also claim that prisoners who do not speak English may obtain assistance from law clerks, legal assistants, staff members, or prisoner translators. *Id.* (citing various portions of record). The citations given in support of this claim in fact indicate that there were significant problems in finding appropriate Spanish translators.

[19] The defendants claim, without citation to the record, that all the prison law libraries contained a standardized list of law books. Pets.' Brief at 3. The district court found, to the contrary, that the law libraries at Alhambra, CB-6, Santa Maria, the Arizona Center for Women, and Rynning were incomplete. Pet. App. B at 33a. In the court of appeals, the defendants conceded that these five law libraries were incomplete. Appellants' Opening Brief, April 4, 1994, at 5 n.5.

The defendants also claim that the library system maintains an interlibrary loan program so that libraries missing a particular volume may obtain it from another prison law library or the Arizona State University Law School Library. Pets.' Brief at 4 (citing R.T. 1/7/92, p. 98; J.A. 149-150). The citation is to the testimony of the librarian at ASPC-Perryville, to the effect that, if a particular volume of the Pacific Second Regional Reporter were missing, she would contact the Arizona State University library. There is no evidence that the prison system as a whole has a general practice of obtaining books from the University, or any interlibrary loan policy. In fact, the exhibits at trial showed a number of instances in which the Perryville librarian simply rejected prisoners' requests for books or other legal materials if they were not in the law library. *See, e.g.*, Exs. 249 jz, 249 kf, 249 jr.

[20] The defendants claim that requests for calls to attorneys are granted unless the prisoner is "abusing the system." Pets.' Brief at 8. In contrast, the district court found that, in order to obtain a telephone call, a prisoner must show a need that cannot be met by mail, and prisoners are so advised. Pet. App. B at 37a-38a. Moreover, the district court found that, if prisoners do not have a pending case, or an attorney of record, they are unable to place a telephone call to a prospective attorney. Pet. App. B at 38a.

Defendants also claim that telephone calls are made in a counselor's office on a non-monitored telephone line, but counselors "are instructed not to

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documents.[21] *See* Pet. App. B at 35a-41a.

E. The Remedial Stage

The district court appointed a special master to work with the parties to develop a remedy for these violations. Over the course of several months, the special master held five meetings with defendants, received five sets of comments and objections from them, and, with their cooperation, developed the proposed remedy submitted to the court.

The district court then issued a permanent injunction in an unpublished order, approving with modifications the remedy proposed by the special master. Injunction, App. C to Petition for Writ of Certiorari (hereinafter Pet. App. C) at 57a-85a. Defendants' characterization of the injunction issued by the district court is materially incorrect in several respects. A description of the pertinent aspects of the injunction, and references to the inaccuracies contained in defendants' brief, are included in the section of this brief addressing the various aspects of the injunction that are challenged by defendants. *See* § V, *infra.*

F. The Appeal to the Ninth Circuit

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[20](...continued)
listen to the calls and will leave the office if requested." Pets.' Brief at 8-9. This is directly contrary to the district court's findings that counselors had refused to leave the room during such calls, even when staff could view the prisoner through the office window. Pet. App. B at 38a. In fact, there had been a policy requiring the counselor to leave if requested during attorney-client telephone calls, but the policy was rescinded. R.T. 1/15/92 at 137; J.A. 207.

[21] Contrary to the defendants' statement that documents being photocopied are not read (Pets.' Brief at 9), the district court made a finding that prisoners have observed people reading legal documents while copying them. Pet. App. B at 27a. In addition, contrary to the defendants' claim that prisoners receive photocopies within forty-eight hours or less of the request (Pets.' Brief at 9), the district court found that while generally photocopying was completed in this time period, prisoners in lockdown at Perryville had to wait as long as nine days. Pet. App. B at 37a.

Defendants appealed both the finding that prisoners had been unconstitutionally denied meaningful access to the courts and the district court's remedial order. The court of appeals affirmed the district court in most respects. *Casey v. Lewis*, 43 F.3d 1261 (9th Cir. 1994), App. A to Petition for Writ of Certiorari (hereinafter Pet. App. A). In particular, the court of appeals applied this Court's decision in *Bounds v. Smith*, 430 U.S. 817 (1977), to uphold the district court's requirement that illiterate prisoners, prisoners who do not speak English, and prisoners without direct access to a law library be given assistance in the form of a sufficient number of trained prisoner assistants. The court of appeals also affirmed various other aspects of the district court's order. The court of appeals vacated the portion of the order requiring typewriters, a provision setting the indigency standard, a provision setting the cost of photocopies, and a provision relating to payment of fees of the special master. Pet. App. A at 11a, 17a-18a.

On May 2, 1994, the order of the district court was stayed by this Court, pending disposition of the petition for writ of certiorari.

SUMMARY OF THE ARGUMENT

The defendants argue that, under *Bounds v. Smith*, 430 U.S. 817 (1977), their only obligation is to provide prisoners with either an adequate law library or the assistance of persons trained in the law. Thus, the defendants argue, *Bounds* permits the State to satisfy its obligation to illiterate prisoners by giving them access to a collection of law books they cannot read. Similarly, defendants argue that providing a law library meets their obligation even for prisoners who scarcely have access to the books.

The defendants' interpretation of *Bounds* makes the right of meaningful access an empty formality. The right of access is not merely a passive right, protected from unjustified interference by prison officials. Rather, the right of access to the courts creates an affirmative duty on the part of prison officials, akin to the affirmative duty that this Court has recognized in other contexts when persons have been deprived of liberty by the State. This

affirmative duty extends to all prisoners. For prisoners who can use a law library without assistance, this obligation can be satisfied by providing a law library or person trained in the law. As the Court has repeatedly recognized, however, illiterate prisoners cannot use even an adequate law library without assistance; systems that provide law libraries to satisfy their obligation to provide access to the courts must assure that some additional assistance is available for illiterate prisoners.

The heart of the district court's findings is its conclusion that defendants did not provide meaningful access for illiterate prisoners and prisoners who lack direct access to a law library. The core remedial provisions flow directly from that violation; the district court, after a full trial and careful consideration of the facts, fashioned a remedy squarely within the mandate of *Bounds* that meaningful access to the courts must be provided to all prisoners.

Other aspects of the remedy, to the extent they are properly before this Court, were narrowly tailored and within the discretion of the district court. Throughout the remedial process, the wishes expressed by the defendants were afforded great deference and, in many respects, the proposed remedial order was modified to accommodate their concerns and objections.

ARGUMENT

I. PRISONS HAVE AN AFFIRMATIVE OBLIGATION TO ASSURE THAT ALL PRISONERS HAVE MEANINGFUL ACCESS TO THE COURTS.

The right of access to the courts is fundamental to a society based on law, even -- or especially -- for prisoners. "Because a prisoner ordinarily is divested of the privilege to vote, the right to file a court action might be said to be his remaining most 'fundamental political right, because preservative of all rights.'" *McCarthy v. Madigan*, 112 S. Ct. 1081, 1091 (1992) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

The importance of prisoners' ability to gain access to the courts *pro se* is nowhere better illustrated than in this Court's own

cases. Each of the last five decisions in this Court concerning the substantive rights of prisoners involved a case commenced and prosecuted by a prisoner proceeding without the assistance of counsel. *See Sandin v. Conner*, 115 S. Ct. 2293 (1995) (prisoner without counsel in district and appeals courts); *Farmer v. Brennan*, 114 S. Ct. 1970 (1994) (prisoner without counsel in district and appeals courts); *Helling v. McKinney*, 113 S. Ct. 2475 (1993) (prisoner without counsel in district and appeals courts; case tried to jury); *Hudson v. McMillian*, 503 U.S. 1 (1992) (prisoner without counsel in district and appeals courts; case tried to jury); *Wilson v. Seiter*, 501 U.S. 294 (1991) (prisoner without counsel in district court).

Much of defendants' argument is premised on the assertion that under *Bounds v. Smith*, 430 U.S. 817 (1977), their obligation to provide access to the courts is satisfied if they provide either an adequate law library or the assistance of persons trained in the law. *See* Pet. Brief at 33-36. This argument misreads *Bounds*. As set forth below, *Bounds* makes clear that prison officials have an affirmative obligation to provide all prisoners with meaningful access to the courts. *Bounds* specifically requires that States provide literate prisoners with either adequate law libraries or the assistance of persons trained in the law. *Bounds* also reaffirms the principle that illiterate prisoners require additional assistance. Thus, the affirmative obligation to provide illiterate prisoners with meaningful access to the courts is not satisfied by the mere provision of law libraries, as the courts below held.

A. This Court Has Recognized That Illiterate Prisoners Need Assistance.

In *Johnson v. Avery*, 393 U.S. 483 (1969), the Court struck down a regulation that barred prisoners from assisting other prisoners in preparing legal documents. Critical to the Court's holding was its reasoning that illiterate prisoners, without some form of assistance, cannot have meaningful access to the courts:

> There can be no doubt that Tennessee could not constitutionally adopt and enforce a rule forbidding

illiterate or poorly educated prisoners to file habeas corpus petitions. Here Tennessee has adopted a rule which, in the absence of any other source of assistance for such prisoners, effectively does just that. The District Court concluded that "[f]or all practical purposes, if such prisoners cannot have the assistance of a 'jailhouse lawyer,' their possibly valid constitutional claims will never be heard in any court."

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> [T]he initial burden of presenting a claim to post-conviction relief usually rests upon the indigent prisoner himself with such help as he can obtain within the prison walls or the prison system. In the case of all except those who are able to help themselves -- usually a few old hands or exceptionally gifted prisoners -- the prisoner is, in effect, denied access to the courts unless such help is available.

Id. at 487-88 (internal citations omitted).

The Court reaffirmed, and expanded upon, this principle in *Wolff v. McDonnell*, 418 U.S. 539 (1974). The district court in *Wolff* had upheld a policy that limited prisoner-to-prisoner assistance because the warden had appointed a legal advisor to assist illiterate prisoners. *McDonnell v. Wolff*, 342 F. Supp. 616, 621 (D. Neb. 1972). The parties had stipulated that the law library's collection of books was generally adequate.[22] The court of appeals vacated that order and remanded, indicating that the district court should reconsider whether more assistance than provided by the one prison advisor was necessary at the facility. *McDonnell v. Wolff*, 483 F.2d 1059, 1064-65 (8th Cir. 1973). This Court rejected the prison officials' challenge to the order for

[22] *See* 342 F. Supp. at 618; *see also Bounds v. Smith*, 430 U.S. at 824.

remand, relying on *Johnson v. Avery*. The Court held that, although the relief sought might place "additional burdens" on prison officials, it was nonetheless justified. In affirming the order for remand, the Court said the following:

> The right of access to the courts, upon which *Avery* was premised, is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights . . . . The recognition by this Court that prisoners have certain constitutional rights which can be protected by civil rights actions would be diluted if inmates, often "totally or functionally illiterate," were unable to articulate their complaints to the courts.

Wolff v. McDonnell, 418 U.S. at 579.[23]

Thus, even before *Bounds v. Smith*, 430 U.S. 817 (1977), the Court accepted the principle that assuring meaningful access to the courts places affirmative burdens on prison officials, and that even adequate law libraries, by themselves, cannot assure access to the courts for illiterate prisoners.

B. An Adequate Law Library Satisfies a State's Obligation Only for Prisoners Capable of Using a Law Library.

Defendants argue that *Bounds* stands for the proposition that a State's entire obligation to assure meaningful access to the courts is satisfied by providing either law libraries or persons

[23] The officials argued that access to the courts is not required in connection with civil rights cases. The Court rejected this argument. *Wolff*, 418 U.S. at 579.

trained in the law. Pets.' Brief at 22-24.[24] This argument relies

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[24] The defendants argue that most circuits have interpreted *Bounds* in this way. Pets.' Brief at 33-34 (citing *Campbell v. Miller*, 787 F.2d 217, 229-30 (7th Cir.), *cert. denied*, 479 U.S. 1019 (1986); *Lindquist v. Idaho State Bd. of Corrections*, 776 F.2d 851, 855 (9th Cir. 1985); *Hooks v. Wainwright*, 775 F.2d 1433, 1435 (11th Cir. 1985) *cert. denied*, 479 U.S. 913 (1986); *Morrow v. Harwell*, 768 F.2d 619, 623 (5th Cir. 1985); and *Cepulonis v. Fair*, 732 F.2d 1, 6 (1st Cir. 1984)). However, none of these cases supports their claim, and the weight of authority is to the contrary. *Campbell* upheld the lack of provision of trained legal assistants for an individual plaintiff who was represented by an attorney and had access to a law library. *See* 787 F.2d at 220, 228-30. The court did not address the rights of illiterate and non-English speaking prisoners. *Lindquist* addressed whether attorneys must be provided to prisoners and did not decide whether assistance short of counsel was necessary: "Assuming the Constitution requires added assistance [to prisoners who are uneducated, illiterate or do not speak English], the plan complies by the use of inmate law clerks to meet the asserted deficit." 776 F.2d at 856. The court suggested this assumption was probably valid: "What is constitutionally adequate . . . cannot be determined solely by counting books and checking law library floor plans. A book and a library are of no use, in and of themselves, to a prisoner who cannot read." *Id.* at 855-56. *Hooks*, like *Lindquist*, held only that States need not provide prisoners with *lawyers*. 775 F.2d at 1437. Although the court did not address the rights of illiterate prisoners, the court noted that "*Bounds* surely did not hold that libraries must be provided to illiterate prisoners" because the fact that books are of "no use to the illiterate" is so obvious as to "need[] no discussion." *Id.* at 1436. In holding that illiterate prisoners need not be provided with lawyers, the *Hooks* court appeared to contemplate the availability of "writ-writers or nonlawyer law clerks" to assist them. *Id.* Indeed, the prison officials' plan for access in *Hooks* included prisoner law clerks and a standardized training system. *See Hooks v. Wainwright*, 536 F. Supp. 1330, 1340 (M.D. Fla. 1982). *Morrow* explicitly declined to issue a ruling on this question: "The issue [of whether the mere provision of a law library satisfies the rights of illiterate prisoners] is not before us because the magistrate concluded that the evidence presented on the literacy and educational backgrounds of the inmates at the jail was 'inconclusive.'" 768 F.2d at 623. However, the *Morrow* court did find that a bookmobile checkout system, accompanied by circumscribed assistance from law students, was inadequate under *Bounds*, even for prisoners who are able to help themselves. *Id.* Finally, *Cepulonis* explicitly noted that it was taking "no position" on whether any supplementation of the satellite library was required to address the rights of illiterate prisoners. The court was able to avoid the question because the defendants had themselves

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on isolated passages in the opinion, directly contradicts other passages, and fails to do justice to the opinion as a whole.

It was critical to the Court's analysis that *Bounds*, unlike *Johnson* and *Wolff*, involved prisoners able to use a law library without assistance. Indeed, the Court began its analysis by stating that *Johnson* and *Wolff* had considered "whether the access rights of ignorant and illiterate inmates were violated without adequate justification." The Court then carefully stated that neither *Johnson* nor *Wolff* "considered the question we face today and neither is inconsistent with requiring additional measures to assure meaningful access *to inmates able to present their own cases.*" *Id.* (Emphasis added).

It is particularly significant that the Court, in discussing its earlier decisions, noted that *Wolff* involved a prison that already contained an adequate law library. *Bounds*, 430 U.S. at 824. Similarly, the Court pointed out that in *Procunier v. Martinez*, 416 U.S. 396 (1974), it had granted relief on an access to courts claim

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[24](...continued)
suggested that prisoners be assisted by a prisoner legal clerk. 732 F.2d at 7.

The courts of appeals that have decided the issue have consistently held that prison officials must provide illiterate prisoners with some assistance from persons knowledgeable about the law. *See, e.g., Knop v. Johnson*, 977 F.2d 996, 1006 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1415 (1993) ("For prisoners [who are unable to present their claims to the courts on their own], there can be no meaningful access to the judicial system unless some literate person is available to reduce their stories to intelligible written pleadings"); *Valentine v. Beyer*, 850 F.2d 951, 956-57 (3d Cir. 1988) (affirming district court's order prohibiting the State from closing a paralegal clinic, based on the "needs of those in closed custody [who are denied access to the law library] and illiterate and non-English speaking inmates who are totally dependent upon paralegal assistance in their legal endeavors"); *Harrington v. Holshouser*, 741 F.2d 66, 69-70 (4th Cir. 1984) (later stage of *Bounds* litigation) (remanding to district court with instructions to make findings of fact regarding the training of prison paralegals, noting that an "important deficiency in the State's efforts toward implementation is its apparent lack of a program to train prisoner paralegals to assist inmates in the use of the library"); *Cruz v. Hauck*, 627 F.2d 710, 721 (5th Cir. 1980) ("Library books, even if 'adequate' in number, cannot provide access to the courts for those persons who do not speak English or who are illiterate").

despite the fact that the prison in question provided adequate law libraries. *Bounds*, 430 U.S. at 824 n.11. Thus, the Court in *Bounds* recognized that the mere provision of an adequate law library does not satisfy the obligation to provide access to the courts for illiterate prisoners.

This reading of *Bounds* is consistent with the actual relief afforded in that case. Although the suitability of the remedial plan submitted by the State was not directly before the Court because the prisoners did not cross-petition for certiorari,[25] the State's plan, as the Court noted, included the training of prisoner law clerks to aid fellow prisoners. *Id.* at 819-20. The plan specifically contemplated that the prisoners who were trained as research assistants and typists would aid illiterate prisoners: "Those inmates who work in the libraries will be assigned library duties on a permanent basis. They will be trained to the best extent possible in researching legal questions and assisting inmates in their research. They will also be permitted to help illiterate and semi-illiterate inmates." *Smith v. Bounds*, 538 F.2d 541, 543 n.1 (4th Cir. 1975); *see also Bounds*, 430 U.S. at 819. Finally, and critically, this reading is consistent with the basic principle articulated in *Bounds* that the fundamental constitutional right of access to the courts requires prison authorities to assist all prisoners in the preparation and filing of meaningful legal papers. *Id.* at 824, 828.

C. Prison Officials Have an Affirmative Duty to Protect Prisoners' Right of Meaningful Access to Courts.

In *Bounds*, this Court delivered its most extensive opinion on the subject of assuring prisoners meaningful access to the courts. The Court flatly rejected the prison officials' argument that their only obligation was a purely negative one, limited to avoiding the creation of obstacles to the right of access to the courts:

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[25] *See* 430 U.S. at 821 n.7.

Petitioners contend, however, that this constitutional duty merely obliges States to allow inmate "writ writers" to function. They argue that under *Johnson v. Avery*, *supra*, as long as inmate communications on legal problems are not restricted, there is no further obligation to expend state funds to implement affirmatively the right of access. This argument misreads the cases.

* * *

> [O]ur decisions have consistently required States to shoulder affirmative obligations to assure all prisoners meaningful access to the courts . . . . This is not to say that economic factors may not be considered, for example, in choosing the methods used to provide meaningful access. But the cost of protecting a constitutional right cannot justify its total denial. Thus, neither the availability of jailhouse lawyers nor the necessity for affirmative state action is dispositive of respondents' claims.

Id. at 823-24, 825.

Defendants argue that the obligation of the States to provide meaningful access to the courts is satisfied if the State eliminates those barriers to access that are inherent in the fact of incarceration. Pets.' Brief at 28-29.[26] Later, however,

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[26] In making this argument, defendants and *amici* extensively rely on *Ross v. Moffitt*, 417 U.S. 600 (1974) (State need not provide counsel for prisoners seeking direct, discretionary appeals to state Supreme Court or United States Supreme Court); *Pennsylvania v. Finley*, 481 U.S. 551 (1987) (State not required to provide an attorney to inmates seeking post-conviction, habeas corpus relief in state court); and *Murray v. Giarratano*, 492 U.S. 1 (1989) (State not obligated to provide attorney to death row inmate seeking post-conviction relief in state court). These cases are inapposite because they addressed the limited question of whether an attorney must be provided to represent these prisoners. Plaintiffs' claim is that illiterate prisoners are entitled to assistance from a literate fellow prisoner, not from a lawyer.

defendants refer to the States' affirmative obligation to provide access to the courts (Pets.' Brief at 33), conceding that an affirmative duty exists.

Defendants' concession is unavoidable. In *Bounds* the Court noted that its decisions "have consistently required States to shoulder affirmative obligations to assure all prisoners meaningful access to the courts," 430 U.S. at 824, and it imposed significant costs and burdens on prison officials by requiring prison officials to provide either libraries or persons trained in the law. *Id.* at 828.[27] Building and operating a law library is an affirmative undertaking; indeed, it is a more burdensome obligation than providing minimal training for prisoner legal assistants.

The affirmative duty recognized in *Bounds* is parallel to the affirmative duties imposed by the Eighth Amendment and the Due Process Clause when the State deprives a prisoner of liberty.[28] These duties arise because of prisoners' special needs and vulnerabilities:

> The rationale for the [imposition of affirmative duties] is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself...it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.... The affirmative duty to protect arises ... from the limitation which it has imposed on his freedom to act in his own behalf.

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[27] This aspect of the holding in *Bounds* applies to those prisoners able to use a library on their own. *See* § I.B., *supra.*

[28] *See Wilson v. Seiter*, 111 S. Ct. 2321, 2327 (1991) (prisoners must be provided with basic life necessities such as food, warmth, and exercise); *Estelle v. Gamble*, 429 U.S. 97 (1976) (prisoners must be provided with treatment for their serious medical needs); *Farmer v. Brennan*, 114 S. Ct. 1970, 1976 (1994) (prisoners' personal safety must be protected); *cf. Bounds*, 430 U.S. at 824 (indigent prisoners must be provided with legal supplies).

DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189, 200 (1989) (internal citations omitted); *accord Farmer v. Brennan*, 114 S. Ct. 1970, 1976-77 (1994) ("having stripped [prisoners] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course") (internal citations omitted).[29]

D. The Provision of Legal Assistance to Illiterate and Non-English Speaking Prisoners Does Not Make Them "Better Off" Than Their Civilian Counterparts.

Akin to the argument that access to the courts imposes no affirmative duty on prison officials is defendants' argument that the provision of assistance by persons with legal training to illiterate prisoners, and the provision of assistance by trained, bilingual assistants to non-English speaking prisoners, makes these prisoners "better off" than their civilian counterparts. Pets.' Brief at 44-45.

As the Ninth Circuit acknowledged, this argument "overlooks the fact that the restrictions on a prisoner's liberty attendant to imprisonment prevents the prisoner from enlisting the assistance of his family, friends, and a myriad of social services and legal aid organizations that would otherwise be available." Pet. App. A at 9a.

Moreover, the comparison between prisoners and their civilian "counterparts" (Pets.' Brief at 45) is meaningless because prisoners simply do not have civilian "counterparts" in this

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[29] The defendants claim that *Turner v. Safley*, 482 U.S. 78 (1987), limits the right of access to the courts. *See* Pets.' Brief at 20-21, 42-44. This Court, however, has never applied a *Turner* analysis to limit prison officials' affirmative duties. Rather, *Turner* applies to regulations that restrict the exercise of prisoners' rights. The right of access to the courts imposes both an affirmative duty and an obligation to refrain from placing unnecessary burdens on that right. *See* note 58, *infra.* Thus, the affirmative duty to provide access to courts in *Bounds* is not limited by *Turner*, although particular prison rules regulating access may be appropriately analyzed under *Turner.*

context. It is the very fact of incarceration that gives rise to prisoners' right of access to the courts. The two kinds of legal actions most basic to the right of access are civil rights claims challenging conditions of confinement and habeas corpus petitions challenging the duration of confinement. *Bounds*, 430 U.S. at 823; *Wolff*, 418 U.S. at 579. The very nature of these claims is that they can be asserted only by prisoners.

As noted above, this Court has recognized that the special needs and vulnerabilities of prisoners give rise to affirmative duties on the part of prison officials. Similarly, the Court has recognized that in a variety of contexts non-English speakers require affirmative assistance if certain rights are to be meaningful.[30] This assistance does not make these groups "better off" than others; it simply makes the right or privilege at issue effective or meaningful.

E. The Nature of Habeas Corpus Petitions and Civil Rights Claims Does Not Obviate the Need for Assistance.

Defendants argue that prisoners who file habeas corpus

[30] This principle has been recognized in the realms of criminal proceedings, *see, e.g., United States ex rel. Negron v. New York*, 434 F.2d 386, 389 (2d Cir. 1970) (a defendant who cannot speak or understand English enjoys "a right to have his trial proceedings translated" to enable him to "participate *effectively* in his own defense") (emphasis added); *United States v. Lam Kwong-Wah*, 924 F.2d 298, 309 (D.C. Cir. 1991); *United States v. Gallegos-Torres*, 841 F.2d 240, 242 (8th Cir. 1988)); the right to vote, *see, e.g., Puerto Rican Org. for Political Action v. Kusper*, 490 F.2d 575, 580 (7th Cir. 1973) (to render right to vote effective, non-English speaking voters entitled to adequate assistance in rendering ballots comprehensible to them); *Torres v. Sachs*, 381 F. Supp. 309 (S.D.N.Y. 1974); and public education, *see, e.g., Lau v. Nichols*, 414 U.S. 563, 566 (1974) (the classroom experiences of non-English speaking children will not be "*meaningful*" if they are "merely ... provid[ed] ... with the same facilities, textbooks, teachers, and curriculum") (emphasis added). For a more extensive discussion of this principle, *see* brief of *amici curiae* the Mexican American Legal Defense and Educational Fund, the Puerto Rican Legal Defense and Education Fund, and the National Asian Pacific American Legal Consortium.

petitions and civil rights claims need only "present the facts underlying their claims, for which they can rely on their personal knowledge."[31] Pets.' Brief at 26. They further argue that all federal circuits and many state courts evaluate *pro se* pleadings under less stringent standards, so that the right of access to courts need only enable prisoners to submit filings that are "minimally adequate." Pets.' Brief at 24-27.

In *Bounds*, the Court rejected this very argument. The Court stated the following:

> Although it is essentially true ... that a habeas corpus petition or civil rights complaint need only set forth facts giving rise to the cause of action, ... it hardly follows that a law library or other legal assistance is not essential to frame such documents. It would verge on incompetence for a lawyer to file an initial pleading without researching such issues as jurisdiction, venue, standing, exhaustion of remedies, proper parties, plaintiff and defendant, and types of relief available. Most importantly, of course, a lawyer must know what the law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action. If a lawyer must perform such preliminary research, it is no less vital for a *pro se* prisoner. Indeed, despite the "less stringent

[31] Amici argue that states should not be required to expend resources, beyond the provision of a law library, on assisting prisoners because habeas corpus petitions are of "secondary" importance. Brief of National Conference of State Legislatures at 12-13, 13 n.6. This argument has been rejected by the Court on numerous occasions. *Johnson v. Avery*, 393 U.S. 483, 485-86 (1969); *Bounds*, 430 U.S. at 827; *see also Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy J., and O'Connor J., concurring) ("It cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death"); *O'Neal v. McAninch*, 115 S. Ct. 992, 996 (1995) ("the errors being considered by a habeas court occurred in a *criminal* proceeding, and therefore, although habeas is a civil proceeding, someone's custody, rather than mere civil liability, is at stake") (emphasis in original).

> standards" by which a *pro se* pleading is judged, it is often more important that a prisoner complaint set forth a nonfrivolous claim meeting all procedural prerequisites, since the court may pass on the complaint's sufficiency before allowing filing *in forma pauperis* and may dismiss the case if it is deemed frivolous. Moreover, if the State files a response to a *pro se* pleading, it will undoubtedly contain seemingly authoritative citations. Without a library, an inmate will be unable to rebut the State's argument.

Bounds, 430 U.S. at 825-26 (internal citations, quotation marks, and paragraph break omitted).

Similarly, without assistance from someone with at least minimal legal knowledge, an illiterate prisoner would be unable to make threshold decisions regarding jurisdiction, venue, standing, exhaustion of remedies, proper parties, and the kinds of relief available, and would be unable to respond to the arguments made by the State in a responsive pleading.

II. THE LOWER COURTS IN THIS CASE PROPERLY FOUND A VIOLATION OF THE RIGHT OF ACCESS TO THE COURTS.

The district court's findings of a violation of the right of access to the courts relate to two large and overlapping groups of prisoners: prisoners who are illiterate or non-English speaking and therefore unable to use a law library on their own; and prisoners unable to obtain direct access to law library books.

A. Illiterate Prisoners Are Denied Meaningful Access.

Defendants have never challenged the district court's finding that there are substantial numbers of prisoners whose

illiteracy precludes them from using a law library on their own.[32] *See* Pet. App. B. at 25a. The district court further found that the only persons assisting illiterate prisoners are the prisoner legal assistants, who are too few in number and too poorly trained, if trained at all, to provide assistance to their illiterate fellows. Pet. App. B. at 28a, 30a. As a result of the inability of illiterate prisoners to receive adequate assistance, prisoners have had their cases dismissed with prejudice and other prisoners have been unable to file legal actions. Pet. App. B. at 25a.

In light of these findings, the district court correctly concluded that the right of access to courts had been violated with respect to illiterate and non-English speaking prisoners. The central holding of *Bounds* is that prison officials must provide prisoners with "adequate, effective and meaningful" access to the courts. 430 U.S. at 822. A library, without more, does not provide "adequate, effective and meaningful access" for someone who cannot read, and a library in English does not meet the *Bounds* standard for someone who cannot read English. *See* § I, *supra*. These obvious propositions support the district court's holding that illiterate and non-English speaking prisoners require the assistance of fellow prisoners who are capable of using law libraries, and that assuring the availability of capable prisoners is an obligation of the ADOC.

B. The Paging System Available to Lockdown Prisoners Does Not Provide Them with Meaningful Access.

Although the ADOC has law libraries, many prisoners are not allowed to use them. The prisoners who experience the greatest difficulties in gaining access to law books are lockdown prisoners. In theory, these prisoners have indirect access to the law libraries through a paging system. In reality, they are

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[32] This finding is consistent with this Court's observation in *Johnson* that "[j]ails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited." 393 U.S. at 487.

restricted in the number of books they can request at a time and the length of time they can keep the books, and they often must give an exact citation in order to receive a book. They routinely experience long delays in receiving requested materials. Prisoners who are in lockdown for less than fifteen days are denied any access to law books; at all times they are denied contact with prisoner legal assistants unless they have a pending disciplinary or criminal charge. The district court found that the combination of these practices caused "severe interference" with access to courts for lockdown prisoners. Many non-lockdown prisoners are in a similar situation: they can go to the library but they are not allowed access to the shelves, and are dependent on others to bring them the items that they request. *See* Statement of the Case at 2-4.

Providing a library for persons whose use of its contents is so restricted does not provide "adequate, effective and meaningful" access to the courts as required by *Bounds*. 430 U.S. at 822-23.[33] A lawyer, let alone a person reading below the eighth grade level, could scarcely do meaningful research when limited to requesting one specific book at a time, with nothing to provide guidance on how to do research and prepare pleadings. Accordingly, the district court correctly found that "[e]ven lockdown prisoners who are intelligent, literate and legally trained are unable to do legal research under [a] paging system that allows only one or two books at a time every couple of days." Pet. App.

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[33] *Amici* argue that *Murray v. Giarratano*, 492 U.S. 1 (1989), held that giving prisoners "adequate and timely access to a law library" or permitting them to have law books in their cells was constitutionally adequate. Brief of National Conference of State Legislatures, *et al.* (citing *Murray*, 492 U.S. at 5, 12). The plurality opinion in *Murray* did not state that providing access to a law library or giving a prisoner books in his cell satisfies the right of access to the courts. *Murray* addressed only the limited question of whether death row prisoners are entitled to the appointment of individual counsel for post-conviction appeals. In fact, the system for access to the courts in *Murray* included the provision of lawyers to act as legal advisors to the death row prisoners. *Id.* at 5; *see also id.* at 14-15 (Kennedy, J., concurring). The system thus provided far more assistance than was required by the district court in this case.

B. at 24a.[34] This conclusion is consistent with that of other courts that have examined similar paging systems.[35]

In sum, the district court correctly found that the bare provision of a law library to the numerous illiterate and non-English speaking prisoners in the custody of the ADOC, and the "paging system" that is available to lockdown prisoners, were inadequate to provide these prisoners with meaningful access to the courts.

III. THE ISSUE OF "ACTUAL INJURY" IS NOT PRESENTED FOR REVIEW; IN ANY EVENT ONLY POTENTIAL OR ACTUAL INJURY IS REQUIRED.

A. Whether a Plaintiff Must Show "Actual Injury" Is Not Properly Presented for Review by this Court.

Defendants argue that the lower courts erred by making findings of liability without proof as to actual injury and causation, which defendants claim are necessary to a finding of a violation of the right of legal access. Pets.' Brief at 30. Defendants, however,

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[34] It is possible that an efficient paging system, with provision to prisoners of an inventory of the law library's contents and prompt delivery of requested materials, would pass constitutional muster for those prisoners who are able to use a law library on their own. The district court was correct, however, in finding that the extremely restrictive paging system that was available to prisoners in the ADOC was constitutionally inadequate.

[35] *See also Knop v. Johnson*, 977 F.2d 996, 1005-07 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1415 (1993); *DeMallory v. Cullen*, 855 F.2d 442, 446-47 (7th Cir. 1988); *Toussaint v. McCarthy*, 801 F.2d 1080, 1108-10 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987); *Corgain v. Miller*, 708 F.2d 1241, 1250 (7th Cir. 1983); *Williams v. Leeke*, 584 F.2d 1336, 1339 (4th Cir. 1978), *cert. denied*, 442 U.S. 911 (1979); *Kaiser v. City of Sacramento*, 780 F. Supp. 1309, 1316 (E.D. Cal. 1991); *Nolley v. County of Erie*, 776 F. Supp. 715, 741 (W.D.N.Y. 1991); *Messere v. Fair*, 752 F. Supp. 48, 50 (D. Mass. 1990); *Maillett v. Phinney*, 741 F. Supp. 288, 292 (D. Me. 1990); *Johnson v. Galli*, 596 F. Supp. 135, 138 (D. Nev. 1984); *Martino v. Carey*, 563 F. Supp. 984, 1003-04 (D. Or. 1983).

never designated the "actual injury" question as one of the "Issues Presented for Review" in defendants' opening brief in the Ninth Circuit. *See* Appellants' Opening Brief at 3. Moreover, defendants' briefs in the court of appeals made no general argument that "actual injury" was required. Instead, they conceded that "actual injury" need not be shown for "core" challenges to the denial of the right of access to the courts, but argued that it must be shown for the "non-core" challenges to the photocopying policy, the attorney telephone call policy, and the provision for typewriters.[36] It is presumably for this reason that the court of appeals found that "th[e] issue [of whether plaintiffs must show actual injury] is not now before us." Pet. App. A at 6a n.3.

The Court should also decline to reach this question, pursuant to the general principle that issues that were not presented to the court below will not be ruled upon by this Court. *See, e.g., Delta Airlines v. August*, 450 U.S. 346, 362 (1981); *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980); *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Silber v. United States*, 370 U.S. 717, 718 (1962).

Moreover, this case presents an inappropriate vehicle to decide whether "actual injury" is required because the district court made explicit findings that illiterate prisoners had had their cases dismissed with prejudice, and had been unable to file legal actions, as a result of their inability to receive adequate legal assistance. Pet. App. B at 25a. Defendants' challenge to these findings was rejected by the court of appeals, Pet. App. A at 8a, and they do not argue here that those findings were clearly erroneous. Accordingly, this case does not squarely present the issue of

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[36] *See* Appellants' Brief at 29-30, 31, 42. In their reply brief, the defendants argued that there was no evidence that illiterate prisoners were denied access to the courts. Appellants' Reply Brief at 2. In context, this appears to be an argument that the district court's findings to the contrary were clearly erroneous. The defendants' other references to the issue are simply statements that plaintiffs failed to make a showing of injury. *See* Appellants' Opening Brief at 10, 36 and Appellants' Reply Brief at 2.

whether, and to what extent, an "actual injury" requirement applies to cases under *Bounds*.

B. Injunctive Relief May Be Granted on a Showing of Potential, as Well as Actual, Injury.

Defendants argue that an "actual injury" requirement is supported by the "plain words" of Section 1983, which "impose[s] liability -- whether for damages or an injunction -- only for conduct which 'subjects, or causes to be subjected,' the complainant" to a deprivation of federal rights. Pets.' Brief at 30. They further argue that courts may be well-equipped to address questions of causation and injury based on past events, but not to decide questions based on hypothetical future injury. *Id.*[37]

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[37] Defendants state that "[m]ost federal courts" have required a showing that "some identifiable prison policy or resource deficiency caused them actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim." Pets.' Brief at 30-31 and 30 n.19 (citing *Strickler v. Waters*, 989 F.2d 1375, 1383 n.10 (4th Cir.), *cert. denied*, 114 S. Ct. 393 (1993); *Crawford-El v. Britton*, 951 F.2d 1314, 1322 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 62 (1992); *Shango v. Jurich*, 965 F.2d 289, 292 (7th Cir. 1992); *Twyman v. Crisp*, 584 F.2d 352, 357 (10th Cir. 1978); and *Vandelft v. Moses*, 31 F.3d 794, 797 (9th Cir. 1994), *petition for cert. filed* (U.S. Apr. 12, 1995) (No. 94-8879)).

The cases cited by defendants do not all support the proposition for which they are cited. One of the cases, involving a one-time misdelivery of legal papers, held that a showing of actual injury is required only when the violation involves an "isolated episode," *Crawford-El*, 951 F.2d at 1321. Another one held that an actual injury requirement does not apply when the challenge is to the adequacy of either the law library or legal assistance. *Vandelft*, 31 F.3d at 796. In fact, most courts have found that a showing of "actual injury" is not necessary to prove a constitutional violation, or at least not for claims that involve "core," "major," or "systemic" violations of the right of access to courts. Such cases include *Muhammad v. Pitcher*, 35 F.3d 1081, 1083-84 (6th Cir. 1994) ("chilling effect" caused by opening of legal mail constitutes "injury in fact"); *Hershberger v. Scaletta*, 33 F.3d 955, 956 (8th Cir. 1994) (denial of free postage to indigents); *Ruark v. Solano*, 928 F.2d 947, 950 (10th Cir. 1991) (denial of access to any legal materials for nine month period); *Diamontiney v. Borg*, 918 F.2d 793, 795 (9th Cir. 1990) (request for

(continued...)

Defendants' argument goes too far. If accepted, it would abolish a large part of the injunctive jurisdiction of the federal courts. After all, the very purpose of an injunction is to prevent injury. The Court's own recent prison jurisprudence illustrates this point. In connection with prisoner-on-prisoner violence, the Court reaffirmed that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief." *Farmer v. Brennan*, 114 S. Ct. 1970, 1983 (1994) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)). Similarly, the Court held that exposure to hazardous prison conditions is actionable based on the likelihood of future injury, observing that "[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them." *Helling v. McKinney*, 113 S. Ct. 2475, 2480-81 (1993). It would be equally odd to hold that an access-to-courts system that fails to address the needs of a large, identifiable segment of the prison population cannot be the subject of injunctive relief when the prospect of injury to some class members, and the corresponding need for relief, is plain.[38] Furthermore, the inability to determine

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[37](...continued)
preliminary injunction to prohibit prison officials' refusal to deliver legal mail under different surname); *Roman v. Jeffes*, 904 F.2d 192, 198 (3d Cir. 1990) (refusal of prison officials to allow plaintiff to bring all his legal research notes, copies of orders issued in cases in which plaintiff was involved, or pleadings filed by opposing parties when plaintiff was transferred from one facility to another); *Peterkin v. Jeffes*, 855 F.2d 1021, 1041-42 (3d Cir. 1988) (denial of access to law library and law clinic workers, with availability of paging system alone); *DeMallory v. Cullen*, 855 F.2d 442, 448-49 (7th Cir. 1988) (no library time, books available only on written request, and paralegal consultation available only by correspondence); *Harris v. Young*, 718 F.2d 620, 622 (4th Cir. 1983) (failure to provide sufficient access to adequate library).

[38] The defendants' argument does not distinguish between the distinct issues of standing and liability. In order to have standing to bring a challenge under § 1983, a plaintiff must suffer actual or threatened injury. *Association of Data Processing Orgs. v. Camp*, 397 U.S. 150, 152 (1970); *see also Schwartz & Kirklin, Section 1983 Litigation: Claims, Defenses, and Fees*, Vol I at 67 (2d (continued...)

whether one has a claim in the first place is itself an injury:

> [T]he right to be protected is the right to have a "reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Bounds*, 430 U.S. at 825, 97 S. Ct. at 1496. Because an inmate is unable to discover his rights when library access or other access to the law is denied him, any complaint rightly alleging a present denial of access to a library or other assistance states a valid claim for equitable relief. It is unfair to force an inmate to prove that he has a meritorious claim which will require access until after he has had an opportunity to see just what his rights are. Not only unfair, it is jurisprudentially unnecessary.

Harris v. Young, 718 F.2d 620, 622 (4th Cir. 1983).[39]

Defendants also argue that the constitutional right at issue is access to courts, rather than access to libraries or legal assistance, so that the right is violated "only when prison policies result in *actual* denial of court access." Pets.' Brief at 31. The distinction drawn by defendants between access to law books or legal information and access to the courts is an empty one, because denial of the means necessary to exercise a right is the functional

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[38](...continued)
ed. 1991). Furthermore, to have standing to seek injunctive and declaratory relief, the threat of future injury must be "real or immediate." *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). Accordingly, the standard for determining standing and the appropriateness of injunctive relief encompasses both actual and threatened injury. Defendants' confusion of the issues of standing and liability is evidenced by the fact that, when they presented this issue to the court of appeals, they asserted that the lack of "actual injury" deprived plaintiffs of standing. *See* Appellants' Opening Brief at 28. Defendants now concede that plaintiffs had standing to raise the claims in this suit. Pets.' Brief at 33 n.23.

[39] For this reason the defendants' emphasis on "actual injury" is a misnomer because, as the court noted in *Harris*, the inability to determine whether one has a claim is, in defendants' terms, an "actual injury."

equivalent of a denial of the right itself.[40]

Finally, defendants argue that without an "actual injury" requirement, prisoners could obtain relief based on generalized complaints about their law library or legal assistance program and courts would be free to implement their own visions and ideals for State prisons, with inadequate standards to guide their discretion. Pets.' Brief at 31-32. But this Court has developed appropriate standards for testing whether a constitutional violation has occurred, even in situations involving prospective injury. *Helling v. McKinney*, 113 S. Ct. 2475, 2480-81 (1993), for example, did not change the substantive standard for an Eighth Amendment violation; it merely held that the plaintiff need not wait to sue until he has already been injured by the challenged condition.

IV. THE DISTRICT COURT AFFORDED PRISON AUTHORITIES AMPLE DEFERENCE IN FORMULATING THE INJUNCTION.

The district court acted with care and deliberation in setting up a process to develop an appropriate remedy. The court appointed a special master to make recommendations to the district court. The order appointing the master specifically limited his role "to investigat[ing] and report[ing] about how best to accomplish the goal of constitutionally adequate inmate access to the courts." Order Appointing Special Master, Pet. App. E at 87a. The district court was free to "accept," "modify," or "reject" the master's recommendations. *Id.* at 91a.[41] Because the district court had

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[40] As noted above, a prisoner who lacks access to law books or legal information will not be able to determine whether she has a claim to present to the courts.

[41] The defendants claim that the "special master and his assistant billed ADOC an average of approximately $12,000 per month in fees and costs while monitoring the prison system before this Court issued the stay, even though the injunction was not yet implemented." Pets.' Brief at 11. The Ninth Circuit vacated and remanded the order relating to the fees and costs of the special master, so this issue is not before the Court. In any event, the plaintiffs have (continued...)

decided an earlier case involving access to the courts for the prisoners in an Arizona prison,[42] the special master was instructed to use the injunction adopted in that case as the starting point for the injunction in this case. Pet. App. B at 48a-49a. Over a number of months the special master met on five occasions with defendants, received five sets of objections from them, and with their cooperation, developed a remedy. The Commentary to the injunction reveals that the special master adopted a substantial number of defendants' requests, modifying the order in numerous respects to accommodate concerns and objections of defendants.[43] Indeed, in some instances, the master provided the ADOC with greater flexibility than defendants requested.[44] The Commentary also reveals that the master carefully considered those requests of defendants that he ultimately decided to reject.

Accordingly, the order represents a thoughtful and cautious approach to remedying the constitutional violations, based on defendants' suggestions and the experience accumulated under an

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[41](...continued)
reviewed the records related to the fees and expenses of the master and believe that the defendants' claims are not factually correct. Aside from significantly overstating the amount of fees and costs involved, the defendants in their brief fail to mention that the amount billed by the master included fees and costs incurred in other cases, including *Gluth*, as well as other matters involving the ADOC.

[42] *See Gluth v. Kangas*, 773 F. Supp. 1309 (D. Ariz. 1988), *aff'd*, 951 F.2d 1504 (9th Cir. 1991).

[43] This Commentary notes that in response to defendants' concerns, the special master eliminated or reduced many requirements of the injunction. For example, the hours of operation of the law libraries were reduced; the number of facilities required to maintain law libraries was reduced; the requirements for legal assistant training were reduced; the availability of notary services was reduced; and the time to respond to prisoner requests for legal assistance was increased. Pet. App. C at 81a-85a.

[44] *See* Commentary, Pet. App. C at 81a ("Although not requested, the Proposed Order [] allows ADOC to operate facilities without law libraries if the population is less than 150") ("The [Proposed Order] reduces the total time requirements in most facilities that ... require advance scheduling. This was done on the initiative of the Special Master based on an assessment of lesser-capacity institutions").

earlier case involving the same prison system and the same district court. The district court thus fully heeded the admonition of this Court in *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977), that the federal courts, in devising a remedy for constitutional violations, must take into account the interests of state and local authorities in managing their own affairs.

V. THE REMEDIAL MEASURES CHALLENGED BY DEFENDANTS WERE NARROWLY TAILORED.

Once a district court has found a constitutional violation, its most fundamental obligation is to eliminate it. The court must craft a remedy that is tailored to cure the condition that offends the Constitution, or conditions that flow from such a violation. *Milliken v. Bradley*, 433 U.S. 267, 282 (1977). In performing this task, "the scope of [the] court's equitable powers...is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971).

In *United States v. Paradise*, 480 U.S. 149, 183 (1987), in reviewing an order addressing employment discrimination by a governmental agency, the Court "acknowledge[d] the respect owed a district judge's judgment that specified relief is essential to cure a violation of the Fourteenth Amendment." The Court also rejected the argument that remedial plans are necessarily limited to the least restrictive means of implementation. *Id.* at 184. Because the district court is more qualified to deal with the "flinty, intractable realities of day-to-day implementation of those constitutional commands,"[45] the district court was in the best position to determine the form of the injunctive remedy to cure the constitutional default. *Id. Accord Hutto v. Finney*, 437 U.S. 678, 688 (1978) (affording "special deference because of the trial judge's years of experience with the problem at hand"). That principle is particularly apt here, where the district court has prior experience with the same issues in a prison operated by the same defendants. *See Gluth v. Kangas*, 951 F.2d 1504 (9th Cir. 1991),

[45] *Id.*, quoting *Swann, supra*, 402 U.S. at 6.

aff'g 773 F. Supp. 1309 (D. Ariz. 1988).

The district court's findings of various constitutional violations, and the injunction adopted to remedy those violations, were based on a three-month trial during which almost every fact was vigorously contested. The court considered hundreds of exhibits and heard the testimony of scores of witnesses. The painstaking manner in which the district court judge considered that evidence and testimony is made abundantly clear by the written opinion finding a constitutional violation, which is heavily supported by citations to the trial record.

The process of crafting a remedy took place over an eight-month period, during which the parties were given numerous opportunities to meet with the special master and to present their objections to him. The master considered each of those objections, accepting many, and explaining his reasons for rejecting others. Thereafter, the proposed order was presented to the district court, with a Commentary explaining the reasons behind the terms of the injunction.

This process was amply deferential to defendants' concerns. It was a process handled by a judge and a special master who have, for the past several years, overseen other litigation involving the same prison system. It is appropriate for such exhaustive fact-finding to occur at the trial-court level. The carefully crafted remedy was reviewed, and largely affirmed, by the court of appeals. This Court should approve the responsible work of the lower courts.

The heart of the remedy here is the provision for training legal assistants to help illiterate prisoners and prisoners without direct access to law books. These provisions cannot be removed without gutting the effectiveness of the remedial order. Accordingly, plaintiffs will primarily focus on these aspects of the remedy. Other provisions of the injunctions were appropriately committed to the discretion of the district court.

Defendants argue that seven particular provisions of the remedy adopted by the district court should be vacated as

overbroad. *See* Pets.' Brief at 39-47.[46] In fact, these remedial measures comply with the principles of equitable discretion described above. Various other aspects of the injunction that are mentioned in defendants' brief, albeit only in passing, were neither raised before, nor passed upon by, the court of appeals, and therefore are not properly presented for review by this Court.[47]

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[46] The provisions involve the following: (1) Library contents and staffing; (2) library hours; (3) library access; (4) legal assistance; (5) legal assistance to functionally illiterate prisoners; (6) access to counsel; and (7) photocopying. Pets.' Brief at 39-47. Each of these is addressed below, although numbers (4) and (5) are treated together, in light of the fact that the district court's remedy regarding the provision of legal assistants was limited to illiterate and non-English prisoners, and those without access to the law library shelves. In their Petition for Writ of Certiorari, defendants argued that the lower court required the ADOC to provide all prisoners with the assistance of persons with legal training. Pet. for Cert. at 3, 7. It is difficult to discern whether defendants wish to maintain this argument. *Compare* Pets.' Brief at 44-45 (arguing that the law does not require the provision of legal assistance to illiterate and non-English speaking prisoners) *with* Pets.' Brief at 45 (taking issue with "the injunction's requirement that Arizona furnish trained, bilingual legal assistants to all inmates"). Regardless of defendants' intentions, as noted by the Ninth Circuit, any assertion that the district court ordered the provision of trained assistants to all prisoners is erroneous. Pet. App. A at 16a. The district court's finding of a denial of access to courts was limited to illiterate and non-English speaking prisoners and prisoners lacking direct access to a law library. Pet. App. B at 41a-44a; Pet. App. C at 69a. The injunction adopted by the district court does not prevent the ADOC from limiting the availability of legal assistants to these prisoners. *See* Pet. App. C. Plaintiffs offer to prove, if this issue is remanded, that the special master on several occasions offered to include an eligibility scheme in the proposed injunction, but that defendants refused this offer, apparently because of the administrative burden of implementing such a scheme.

Defendants also argue that the injunction must be reversed in its entirely because it is not narrowly tailored. *See* Pets.' Brief at 37-39. However, as demonstrated in this section, even those aspects of the injunction that defendants allege are particularly overbroad were proper under the circumstances of this case. Furthermore, even if particular provisions of the injunction are overbroad, they should be addressed individually.

[47] These references are to the following aspects of the injunction: (1) The kind and quantity of supplies that must be provided to "all prisoners," Pets.' (continued...)

A. Provisions of the Injunction Related to Trained Prisoner Assistants

Defendants and *amici* argue that the injunction adopted by the district court to remedy the violation of the rights of illiterate and non-English speaking prisoners, as well as those without direct access to the law library shelves, is overbroad because it regulates the selection, number, training, and retention of legal assistants. Pets.' Brief at 10 and 44-45; Brief of Criminal Justice Legal Foundation at 18. In fact, the injunction adopted by the lower court did no more than remedy the constitutional violations found by the court. Plaintiffs will address each aspect of the injunction in turn.

1. Selection of Legal Assistants

The district court found that there were no specific knowledge or performance requirements, and no required training, for the position of legal assistant. Pet. App. B at 30a-31a. The court further found that the legal assistants available to illiterate and non-English speaking prisoners were frequently insufficiently skilled to provide adequate services. Pet. App. B at 30a.

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[47](...continued)
Brief at 36. In fact, this provision applies only to indigent prisoners. Pet. App. C at 78a-79a. (2) The procedures for removing from the library prisoners who create disturbances, Pets.' Brief at 11. (3) The noise level of libraries, Pets.' Brief at 11. (4) The requirement that the ADOC "provide fully equipped law libraries at every prison unit with a capacity of 150 inmates," Pets.' Brief at 10. In fact, the injunction exempts five specific units from the law library requirement (*see* Pet. App. C at 61a) in order to avoid requiring defendants to build any new libraries. Commentary, Pet. App. C at 81a. (5) The procedure for determining where a prisoner may sit while using the law library, Pets.' Brief at 10. (6) The procedure for allowing prisoners to request the times at which they will use the law libraries, Pets.' Brief at 11. (7) The role of the special master, Pets.' Brief at 10-11. The duties of the master, and the documents that defendants are required to provide to him, are simply designed to allow him to monitor the defendants' implementation of the remedial order.

As a remedy for this violation, the district court adopted the following injunction:

> A prisoner shall become a Legal Assistant by agreeing to abide by the procedures governing Legal Assistants, and by taking the legal research course. It shall not be necessary for prisoners to take the course prior to being approved as a Legal Assistant or beginning work. Such persons must have some legal research training, experience, or ability, and, after selection, must successfully complete the full course including the live component when first available. Applicants are eligible for the full course if (a) they have a high school or GED diploma, or (b) pass a basic literacy skills test to the satisfaction of the instructor, or (c) are presently on an institutional Legal Assistant list.

Pet. App. C at 70a. This narrowly tailored remedy imposes extremely basic and minimal eligibility requirements for legal assistants: literacy or a high school education. This standard simply ensures that the legal assistance program will amount to more than the "illiterate leading the illiterate." The injunction also shows ample deference to defendants by allowing them to retain all prisoners who are presently functioning as assistants, regardless of their qualifications.

2. Number of Legal Assistants

The district court found that the number of prisoners provided to assist illiterate or non-English speaking prisoners was inadequate. Pet. App. B at 44a. In making this finding, the district court relied on the parties' pretrial stipulation, which was supported by testimony and other evidence. *See* Pet. App. B at 28a, 28a n.64.

To remedy this violation, the district court adopted the following injunction: "ADOC must maintain a sufficient number of at least minimally trained prisoner Legal Assistants at each

facility." Pet. App. C at 70a. "ADOC shall act to insure an adequate minimum number of Legal Assistants for each institution and custody level; there is no maximum. Particular steps must be taken to locate and train bilingual prisoners to be Legal Assistants." Pet. App. C at 70a.

This remedy is narrowly tailored to the court's finding because it requires only that the ADOC maintain a "sufficient number" of assistants, and is thus similar to the requirement upheld in *Wolff v. McDonnell*, 418 U.S. at 579-80 ("At present only one inmate serves as legal adviser and it may be expected that other qualified inmates could be found for assistance if the Complex insists on naming the inmates from whom help may be sought"). Contrary to defendants' claims, the ADOC need not maintain an "optimal" number of legal assistants (*see* Pets.' Brief at 17); nor does the order specify the exact, or even approximate, number of assistants that must be provided. With regard to bilingual assistants, the injunction is even less demanding. It simply requires defendants to take steps to "locate and train bilingual prisoners," but does not require that defendants actually succeed in these efforts by providing an adequate number of bilingual assistants.

3. Training of Legal Assistants

The district court found, based on extensive trial testimony, that the legal assistants and law clerks are often insufficiently trained to provide prisoners with adequate legal assistance. Pet. App. B at 30a. Defendants stipulated that there was no Department of Corrections training program for prisoner law clerks, and no requirement that they have any legal training. Stipulation, J.A. 50.

In response to these findings, the district court adopted the following injunction: "ADOC must maintain a sufficient number of at least minimally trained prisoner Legal Assistants at each facility." Pet. App. C at 70a. "ADOC shall offer a videotaped legal research course for all prisoners, with an additional live component for prisoner law clerks, and Legal Assistants, and applicants.... The video will be 30-40 hours long with a primary

focus on the fundamentals of legal research and writing, including use of the books and materials available in the law libraries." Pet. App. C at 71a. "Shortly after viewing the taped course, prisoner law clerks and Legal Assistants, and applicants, shall be offered an additional twenty hours of live instruction.... The live portion shall include sessions in a facility law library, with written exercises required and returned with comments. Based on a student's performance in class and on assignments, the instructor shall determine whether the prisoner is minimally competent to assist others." Pet. App. C at 72a.

The requirement that assistants be "minimally trained" is narrowly tailored to ensure that they have basic competency to perform their function. Contrary to defendants' claim (Pets.' Brief at 17), the district court did not require that the assistants be "optimally" trained. The requirement of 30 hours of videotaped training and 20 hours of live instruction amounts to a minor imposition on prison authorities, given the complexity of the legal issues that the assistants will be required to address. Indeed, this regimen amounts to less than two weeks of training.

4. Competence of Legal Assistants

The district court found that the legal assistants available to illiterate and non-English speaking prisoners frequently lacked sufficient skills. Pet. App. B at 30a. It also found that there was no system in place to evaluate their work. Pet. App. B at 31a.

To address these problems, the district court adopted the following injunction: "A Legal Assistant must demonstrate at least minimal competence after one year, and thereafter upon the receipt of complaints about his or her legal work.... A determination by the instructor to remove a prisoner found not minimally competent from the Legal Assistant list must be made in writing with specific reasons and examples, and the relevant work products attached." Pet. App. C at 71a.

Again, this requirement that legal assistants be "minimally competent" to perform their function is a reasonable one.

5. Lockdown Prisoners

The district court's injunction includes the following language: "ADOC prisoners in all housing areas and custody levels shall be provided regular and comparable visits to the law library. This opportunity may be postponed on an individual basis because of the prisoner's documented inability to use the law library without creating a threat to safety or security, or a physical condition if determined by medical personnel to prevent library use." Pet. App. C at 61a. Defendants rely on this language to argue that the injunction requires them to grant all prisoners direct access to library stacks, unless they have documented a particular prisoner's inability to use the law library without creating a threat to safety or security. Pets.' Brief at 10; *see also id.* at 41-44.[48]

Defendants' argument rests on a fundamental mischaracterization of the injunction. In fact, they won this point in the district court, and there is no case or controversy on this matter. If the Court believes that the injunction should be clarified, plaintiffs do not object to a remand for clarification of the order to provide explicitly that all prisoners in lockdown for disciplinary or security reasons can be barred from going to the law library, provided that they are provided with an effective, alternative means of access to the courts.

a. High Security Prisoners Housed at SMU and CB-6

To the extent that defendants' argument refers to prisoners housed at SMU and CB-6, the "high security" prisoners within the ADOC, the Commentary to the injunction specifies that defendants need not provide access to the law library shelves to these prisoners and need not engage in case-by-case documentation of

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[48] It is unclear whether defendants' argument refers to high security prisoners (those housed at the SMU and CB-6 units at the Florence complex) or those prisoners in segregation for disciplinary or security reasons. *See* Pets.' Brief at 42 (referring to "high-risk inmates") and at 43 (referring to "segregated inmates"). Accordingly, plaintiffs address both categories below.

the risks they pose:

> As was the case in *Gluth*, the [Proposed Order] permits use of a "check-out" system in maximum security facilities. It adopts Defendants' more practical position that this system can -- with the necessary showing -- be instituted prisonwide, and not only on the person-by-person basis proposed by Plaintiffs. At this time, a check-out system may be used at the Central Unit, CB6 and Special Management Unit facilities.

Pet. App. C at 83a.[49] This language permits defendants either to exclude high-security prisoners from the library or to continue their present policy of allowing them to visit the library but not to go directly to the shelves. *See* Pets.' Brief at 5.

b. Prisoners in Segregation for Disciplinary or Security Reasons

The injunction also does not prevent the ADOC from denying prisoners who are in lockdown for disciplinary or security reasons access to the law library; the language from the injunction that is quoted above simply does not apply to prisoners who are in segregation. Defendants knew that the injunction did not require them to provide lockdown prisoners with any greater access to the law library than they were already providing. In fact, the language in the injunction tracks, in identical language, the existing policy of the ADOC, which dates from 1991. DOC Policy on Inmate Access to Legal Assistance, Ex. 216 ¶ 6.22. This understanding of the terms of the injunction is made even clearer

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[49] This Commentary was included in response to defendants' request for clarification on this issue. *See* Objections to the Special Master's Proposed Order, Aug. 13, 1993, J.A. 247 ("Obviously, for security concerns, inmates at SMU and CB6 cannot be allowed access to the stacks. Although defendants believe that the Special Master did not intend these facilities to be included, it is not clear").

by the fact that defendants did not object to this provision (§ I.A. of the Injunction) in any one of the five sets of objections filed over an eight-month period. Moreover, plaintiffs offer to prove, if this issue is remanded, that this language is also in the *Gluth* order and its uniform interpretation by the special master in *Gluth* has been that all prisoners in segregation for disciplinary or security reasons are, and can continue to be, barred from going to the law library.

The district court's order obviously contemplated that numerous prisoners would be denied physical access to a law library; it is for these prisoners (and illiterate and non-English speaking prisoners) that the district court ruled that the provision of legal assistance was necessary.[50] In so ruling, the district court deferred to defendants to determine how they would provide meaningful access to courts to lockdown prisoners: if defendants maintain their policy of denying law library access to lockdown prisoners, which they are free to do under the injunction, they must provide trained legal assistants to these prisoners as an alternative means of access to courts.

B. Other Provisions of the Injunction

1. Library Contents

Defendants challenge two requirements imposed by the district court with respect to library contents.[51] First, defendants mention in passing that the injunction requires them to maintain

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[50] "[I]f the state denies physical access to the law library, the state must provide that prisoner with legal assistance." Pet. App. B at 42a. The constitutional violation resulted, not because prison officials must grant direct access to a law library, but because the paging system alternative was inadequate to constitute access to a library (Pet. App. B at 42a), and "[u]ntrained prisoner legal assistants cannot provide constitutionally sufficient access to the courts for prisoners denied access to a law library." Pet. App. B at 43a.

[51] The defendants claim that all ADOC law libraries contain all other required materials. Pets.' Brief at 3. This is contrary to the district court's findings and defendants' admissions in the court of appeals. *See supra*, n.19.

self-help manuals in the library collections. *See* Pets.' Brief at 40. However, it is unclear whether they wish to challenge this requirement, particularly because they offer no argument that it is improper. If the Court reaches this question, it should find that the district court properly imposed this requirement because such manuals are the only keys even literate prisoners will have to using the law libraries. These materials are necessary to make the contents of the law library of any use to prisoners able to undertake research on their own. The law library list in *Bounds* also included hornbook and general research aids. *See* 430 U.S. at 819 n.4.[52]

Defendants also argue that the requirement that they "purchase a complete, up-to-date set of Pacific Reporters and digests for each law library" (Pets.' Brief at 10) is overbroad and should be reversed. Pets.' Brief at 39-40. The evidence at trial established that prisoners in the custody of the ADOC were subject to criminal proceedings in neighboring states. *See* R.T. 12/19/91 at 119-120. The district court's finding that Pacific Reporters and digests must be maintained for such prisoners is consistent with the rulings of other courts that meaningful access to the courts includes access to resource materials from other jurisdictions when a prisoner has a criminal conviction from that jurisdiction. *See Caldwell v. Miller*, 790 F.2d 589, 606-07 (7th Cir. 1986); *Sills v. Bureau of Prisons*, 761 F.2d 792, 796 (D.C. Cir. 1985); *Rich v.*

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[52] The *Bounds* list was based on the collection currently recommended by the American Correctional Association, American Bar Association, and the American Association of Law Libraries. *See id.* The collection currently recommended by the American Correctional Association still includes self-help litigation manuals as a basic material. *See* American Correctional Association, *Correctional Facility Law Libraries: An A to Z Resource Guide* at 3-4 (1991). Several lower courts have endorsed this list. *See, e.g., Ramos v. Lamm*, 639 F.2d 559, 584 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *see also Abdul-Akbar v. Watson*, 4 F.3d 195, 203 (3d Cir. 1993) (referring to self-help manuals as one of the types of legal materials that would render a law library collection adequate).

Zitnay, 644 F.2d 41, 43 & n.1 (1st Cir. 1981).[53]

Defendants suggest that this requirement goes beyond the collection required in *Bounds*, 430 U.S. at 819 n.4. Pets.' Brief at 40. In *Bounds*, however, the order for legal access required the prison officials to maintain a set of the relevant state reporters. In contrast, this injunction does not require defendants to maintain the Arizona Reporters (Pet. App. C at 69a), so the provision for Pacific Reporters serves as the functional equivalent of the requirement to maintain state reporters in *Bounds*.

2. The Qualifications for Librarians

Defendants seek the reversal of the requirement that the ADOC employ a full-time, professionally trained librarian for every library. Pets.' Brief at 39-41.[54] Contrary to defendants'

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[53] The defendants argue that it is the responsibility of the other jurisdictions to provide regional reporters to Arizona prisoners. Pets.' Brief at 40 n.24 (citing *Boyd v. Wood*, 52 F.3d 820, 821 (9th Cir. 1995)). *Boyd* deals only with prisoners incarcerated pursuant to the Interstate Corrections Compact, under which the sending state retains responsiblity for the transferred prisoner.

[54] The Court should not consider this objection to the injunction because defendants' objection to it was untimely, and the district court's order refusing to consider it was therefore well within its discretion. Defendants had repeated opportunities to raise the objection in four sets of objections filed over a six-month period (*see* Order Denying Plaintiffs' Motion to Dismiss Defendants' Objections, Sept. 27, 1993, J.A. 251-52), yet they raised it for the first time in their fifth set of objections (*see* Defendants' Objections to the Special Master's Proposed Order, Aug. 13, 1993, J.A. 246), which the district court had limited to objections that could not have been made earlier. Injunction, Pet. App. C at 58a. The defendants' response did not conform to the limitations imposed, and was based on conclusory allegations resolution of which would have substantially reopened the process of developing a remedy. Nonetheless, the defendants opposed a reopening of this process. Injunction, Pet. App. C at 58a. The district court appropriately held that the special master had the "discretion to disregard any objections or claims that were made for the first time in the final objections filed on August 13, 1993 and any objections that are not supported by evidence." District Court Order Denying Dismissal of Objections, Sept. 27, 1993, J.A. 253. Nonetheless, the district court noted that it "is willing to

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statement (Pets.' Brief at 10), the injunction does not require "each 'librarian' to possess a law degree or paralegal degree." Rather, the injunction requires that librarians have a law, paralegal, or library science degree. *See* Pet. App. C at 67a.[55] Also contrary to defendants' statement, the injunction does not require them to hire a librarian "for every library." Pets.' Brief at 40.[56]

The district court found that many of the law libraries are not staffed by librarians, that "ADOC recognizes a need for additional librarians, but requests for additional staff have been rejected," and that "[t]here is a specific need for more library staff to assist in providing library services to prisoners in lockdown at the Perryville facility." Pet. App. B at 28a-29a. Although some librarians have training in library science, this is not a requirement. Also, staff is not required to have training in legal research." Pet. App. B at 32a. The librarians (along with prisoner legal assistants and law clerks) are "responsible for providing legal services to all prisoners in the facilities." Pet. App. C at 28a.

These findings support the requirement for professionally trained librarians. As the district court recognized, it stands to

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[54](...continued)
ma[k]e changes to accommodate the defendants if good reasons exist for making the changes." District Court Order Denying Dismissal of Objections, Sept. 27, 1993, J.A. 252. The Court should leave this issue for resolution during implementation of the injunction.

[55] Paralegals were added to the list of persons eligible to serve as librarians in order to expand the pool of applicants, because the district court anticipated that paralegals would be more readily available than persons with a degree in library science. Pet. App. C. at 59a. The injunction also requires defendants to attempt to hire, as one of the librarians for each prison complex of several institutions, a librarian with a law or paralegal degree, but the injunction contemplates that if persons with this training are not available, staff with librarian training may be hired. Pet. App. C at 67a. The commentary notes that hiring staff with legal or paralegal training would reduce the total costs to defendants because these staff could teach the required research courses and monitor the work of the legal assistants. Pet. App. C at 82a-83a.

[56] A librarian may be assigned to cover a second facility if the population of that facility is less than 200. Pet. App. C at 66a-67a.

reason that in order to provide prisoners with adequate law library services, a librarian must be minimally trained to provide those services. Pet. App. B at 32a.

3. Library Hours

Defendants argue that this portion of the injunction should be reversed, characterizing it as a requirement that the ADOC "open all ADOC law libraries between 50 and 80 hours per week, including night and weekend hours, regardless of demand." Pets.' Brief at 10; *see also id.* at 41. Defendants' characterization is wrong. Defendants are initially required to provide a minimum of fifty hours per week during which the law libraries are open, with greater hours according to population if the facility requires prisoners to request access in advance. Pet. App. C. at 62a. However, the district court recognized in the order that low actual usage rates for particular law libraries would justify further reductions in the scheduled hours. The injunction specifically contemplates that when information about actual usage rates is available, the library hours will be further adjusted in light of below-average usage rates. *See* Pet. App. C at 64a. Thus, contrary to defendants' statement (Pets.' Brief at 10), the district court never contemplated that these hours would be maintained "regardless of demand."

Defendants contend that the district court failed to make any findings regarding the adequacy of the hours of operation of the law library. Pets.' Brief at 10, 41. In fact, the court specifically found that, at the time the case was filed, prisoners had insufficient time in the law libraries (Pet. App. B. at 41a), a finding adopted by the court of appeals. Pet. App. A at 15a.[57] While the litigation was pending, defendants increased the hours of operation of the law libraries. *Id.* Because of the history of a constitutional violation, however, the district court was entitled to prevent defendants from reverting to the earlier unconstitutional

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[57] The defendants have never challenged the district court's finding that the previous hours of operation were constitutionally inadequate.

policies. This Court has consistently held that reforms made under pressure of litigation neither moot a controversy nor bar injunctive relief. *See, e.g., City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982); *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

4. Access to Telephone Calls to Counsel

The district court ordered defendants to "provide a weekly minimum of three 20-minute telephone calls to an attorney, an attorney representative, or legal organization." Pet. App. C at 76a. Defendants argue that this aspect of the remedy should be reversed as overbroad, and that the primary means of attorney-client communication should be written correspondence. Pets.' Brief at 10, 46-47.

The district court found that defendants themselves conceded that prisoners sometimes need telephone contact with attorneys (Pet. App. B at 39a), and that the ADOC's telephone policy "significantly diminishes the ability of prisoners to have access to the courts because they are unable to have confidential attorney-client calls." Pet. App. B at 40a. This Court has held that "[r]egulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid." *Procunier v. Martinez*, 416 U.S. 396, 419 (1974) (striking down regulation that barred use of law students and paraprofessionals for prisoner interviews).[58]

The defendants' attorney telephone call policy fails to satisfy the test established in *Procunier*. It obstructs access because prisoners must make disclosures to staff that are

[58] The defendants' constitutional responsibility to avoid creating unnecessary barriers to access to lawyers is independent of their affirmative obligation to provide all prisoners with access to the courts. *See Bounds v. Smith*, 430 U.S. at 824 n.11 (noting that *Procunier* had struck down the regulation limiting access to paraprofessionals even though California provided adequate law libraries and permitted prisoner legal assistance).

inconsistent with attorney-client confidentiality.[59] The policies are unreasonable and irrational because they vary from prison to prison, and the decision to grant or deny a telephone call is made on the basis of factors unrelated to the prisoner's need.[60] Furthermore, the uncontroverted evidence at trial established that the telephone policy has resulted in harm.[61]

Numerous courts of appeals have recognized that telephone calls with a prisoner's lawyer fall within the right of access to courts set forth in *Bounds*. In *Johnson by Johnson v. Brelje*, 701 F.2d 1201, 1208 n.8 (7th Cir. 1983), the Seventh Circuit upheld a district court order that required that prisoners be given a reasonable opportunity to telephone attorneys. Citing this Court's ruling in *Procunier*, the court in *Brelje* held that the prison's telephone regulation was an unjustifiable restriction on the right of prisoners to receive the assistance of attorneys. *Id.* at 1207.[62]

The injunction adopted by the district court provides that telephone calls are to be placed collect to counsel or a legal

[59] Prisoners are required to substantiate a need for telephone communications that cannot be met by mail or attorney visitation, and requests are denied by staff when such a need is not demonstrated to their satisfaction. Pet. App. B at 37a-38a. Furthermore, at some facilities, the prisoner must tell staff the exact nature of the call before the confidential attorney-client call is granted. Pet. App. B at 39a-40a.

[60] *See* Pet. App. B at 37a-40a.

[61] *See, e.g.*, Tr. 12/19/91 at 100-109 (Coley) (prisoner indicates he missed court deadline because of delay in telephone call to lawyer and that staff are always in room during attorney client calls; nothing in cross examination challenges these statements). Thus, defendants are incorrect that the district court "did not find that the ADOC's current policy denies inmates reasonable contact with existing or potential attorneys, much less that any inmate has suffered an actual injury to his due process or equal protection rights." Pets.' Brief at 46.

[62] *See also Tucker v. Randall*, 948 F.2d 388, 391 (7th Cir. 1991); *Divers v. Department of Corrections*, 921 F.2d 191, 194 (8th Cir. 1990); *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051-52 (8th Cir. 1989); *Montana v. Commissioner's Court*, 659 F.2d 19 (5th Cir. 1981), *cert. denied*, 455 U.S. 1026 (1982); *Gillespie v. Civiletti*, 629 F.2d 637 (9th Cir. 1980).

organization, or must be paid for by the prisoner.[63] These limitations ensure that the effect of the provision challenged by defendants will be limited to those circumstances in which a prisoner has a real need to speak with counsel.

5. Photocopying

The district court found that "ADOC's photocopy policy does not ensure that the substance of prisoners' confidential legal materials are not read by other prisoners or staff." Pet. App. B at 36a-37a. There was testimony, credited by the district court, that people had been observed reading documents during the photocopying process. *See* Tr. 12/17/91 at 152 (Bishop).

The sole relief granted by the district court on this issue was a requirement that the Department of Corrections advise the staff "that prisoner legal materials are confidential and may not be read" and post a sign to this effect on copying machines. Injunction, Pet. App. C at 77a. Defendants argue that this requirement should be reversed. Pets.' Brief at 47. They further argue that "Respondents never contended that the manner in which legal materials were photocopied deprived any inmate of his right of access to the court." *Id.*

This Court has long recognized the importance of confidentiality in the attorney-client relationship. *See Upjohn Co. v. United States*, 449 U.S. 383, 389-91 (1981). Courts of appeals have consistently found that protection of the confidences that arise in a prisoner-counsel relationship is of fundamental importance.[64] Indeed, the importance of confidentiality of communications is

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[63] This limitation was requested by defendants (*see* Defendants' Objections to the Special Master's Proposed Order, Aug. 13, 1993, J.A. 249), and was incorporated into the injunction. *See* Pet. App. C at 76a.

[64] *See, e.g., Bieregu v. Reno*, 59 F.3d 1445, 1455 (3d Cir. 1995); *Ching v. Lewis*, 895 F.2d 608, 609 (9th Cir. 1990); *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1052-53 (8th Cir. 1989); *Bach v. The People of the State of Illinois*, 504 F.2d 1100, 1102 (7th Cir.), *cert. denied sub nom. Bensinger v. Bach*, 418 U.S. 910 (1974); *Adams v. Carlson*, 488 F.2d 619, 630-32 (7th Cir. 1973); *Goodwin v. Oswald*, 462 F.2d 1237, 1241 (2d Cir. 1972).

particularly heightened in the prison setting because of the potential for staff interference, harassment and retaliation, an "injury" that was shown at trial to be a reality.[65]

Principles of confidentiality do not protect only communications between attorney and client, but extend to legal materials generally. *See Muhammad v. Pitcher*, 35 F.3d 1081, 1083-84 (6th Cir. 1994) (finding that principles of confidentiality apply to letters from Attorney General to prisoner), and cases cited therein, *id.* at 1083. Letters from opposing counsel, elected officials, and government agencies, as well as court filings, create the same potential for retaliation by staff, particularly because a substantial portion of the litigation filed by prisoners involves conditions of confinement challenges, including challenges to particular actions by staff.

Defendants' argument may be that a showing of staff retaliation is not a sufficient showing of injury, but that a showing of an actual denial of access to courts is required. However, our legal system protects attorney-client confidences in order to avoid a "chilling effect" that prevents individuals from seeking the assistance of counsel. It is designed to "facilitate[] the full development of facts essential to proper representation of the client [and to] encourage[] laymen to seek early legal assistance." *Upjohn Co. v. United States*, 449 U.S. 383, 389-91 (1981) (quoting Model Code of Professional Responsibility EC 4-1). If a prisoner knows that the right to confidential communications with her attorney is protected only if a confidence is first violated, and is violated in such a way that actually prevents her from gaining access to a court, the right of confidentiality would have been effectively eviscerated, and the chilling effect that the

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[65] Stephen Bishop, a prisoner legal assistant, testified that he had filed a civil rights case on behalf of Nathan Daley, another prisoner. This lawsuit alleged that a correctional officer had assaulted Mr. Daley. Following Mr. Bishop's assistance in the case, the defendant in Mr. Daley's lawsuit started harassing Mr. Bishop, telling him that "what goes around comes around." Tr. 12/17/91 at 110, 138-139 (Bishop). The defendants offered no rebuttal to this testimony.

protection is designed to prevent would necessarily occur.[66]

The defendants have no legitimate interest in reading prisoners' legal materials.[67] Because the district court found that reading had occurred in the past, this innocuous aspect of the injunction was well within its discretion.[68]

CONCLUSION

For the above reasons, plaintiffs urge this Court to affirm the decision of the court of appeals.

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[66] For this reason, in *Muhammad v. Pitcher*, 35 F.3d 1081, 1083-84 (6th Cir. 1994), the court found that the "chilling effect" caused by opening legal mail constitutes sufficient "injury."

[67] Defendants have never claimed that staff have a right to read these documents.

[68] Defendants note that "the injunction goes so far as to set forth the amount per page Petitioners can charge inmates for copies." Pets.' Brief at 47. The Ninth Circuit vacated and remanded this portion of the order. Pet. App. A at 17a.

Respectfully submitted,

Elizabeth Alexander
(Counsel of Record)
Ayesha Khan
Margaret Winter
Alvin J. Bronstein
National Prison Project
of the American Civil
Liberties Union Foundation
1875 Connecticut Avenue, N.W.
Suite 410
Washington, DC 20009
(202) 234-4830

Alice L. Bendheim
1542 West McDowell Road
Phoenix, AZ 85007
(602) 253-2954

Steven R. Shapiro
American Civil Liberties
Union Foundation
132 West 43rd Street
New York NY 10036
(212) 944-9800

Attorneys for Respondents